In The
Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-702

EARL EKAS and MARTIN FEURER, JR.,
On behalf of themselves and
all others similarly situated,
Petitioners,

v.

CARLING NATIONAL BREWERIES, INC.
and BREWERY WORKERS LOCAL UNION NO. 1010,
affiliated with the International Brotherhood of
Teamsters, Chauffeurs, Warehousemen
and Helpers of America,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR CARLING NATIONAL BREWERIES, INC. AND BREWERY WORKERS LOCAL UNION NO. 1010 IN OPPOSITION

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QUESTION PRESENTED

Do a Union and an Employer,

faced with the merger of two plants

into one, have the right to merge the seniority lists of the two plants by amending the existing labor agreements so that long-service employees will not be laid off?

In the Courts below, there was an additional issue concerning whether the Union, in agreeing to such an amendment, had satisfied its duty of fair representation to the employees at the Beltway plant (Pet. App. 4(a).) Both the District Court and the Fourth Circuit held that the Union had clearly satisfied its duty of fair representation, and apparently the Petitioners have abandoned this issue (see Petition, pgs. 2-3, Questions Presented).

STATEMENT OF THE CASE

The factual basis of this case is set forth succinctly in the opinion of the Fourth Circuit appearing

at pages 1a to 9a of the Petition Appendix. Therefore, they need not be repeated here. Suffice it to say that this case presents a simple factual situation. Carling National Breweries, Inc. (hereinafter called the Company) had two plants in the Baltimore, Maryland metropolitan area. Brewery Workers Local Union No. 1010 (hereinafter called the Union) represented the employees at both plants under separate collective bargaining agreements. Because of economic necessity, the Company was forced to close its Dillon Street Plant and move the production of that plant to its Beltway Plant. As a result of this merger of operations, it was anticipated that approximately 52% of the merged operations at the Beltway Plant would consist of production transferred from the closed Dillon Street Plant.

The anticipated workforce at the merged Beltway operations would be substantially less than the total of the former Dillon Street workforce and the former Beltway workforce. Thus, a substantial layoff of employees was going to take place. The Dillon Street employees, in general, had far greater seniority than the Beltway employees. The collective bargaining agreements covering the Dillon Street Plant and the Beltway Plant did not provide for such a situation. Therefore, the Company and the Union entered into a lengthy series of negotiation meetings, culminating in a Memorandum of Understanding amending the two collective bargaining agreements and providing for, among other things, severance benefits and liberalized pension benefits for employees who were forced to accept the layoff or who chose to

retire in order to make room for junior employees. The Memorandum of Understanding also merged the two labor agreements into one and provided for the dovetailing of the departmental seniority lists at the two plants on a one-for-one basis, with preference given to any employee who had more than 10 years of service with the Company. In substance, the dovetailing arrangement permitted one Beltway employee to remain in the workforce for every Dillon Street employee remaining in the workforce so that the combined workforce would be approximately 50% former Beltway employees and 50% former Dillon Street employees, reflecting the fact that the merged production would also be approximately 50% former Dillon Street production and 50% former Beltway production.

The fairness of this arrange-

ment is beyond argument. Nevertheless, the Beltway employees objected to the dovetailed seniority lists. Their view was that all Beltway employees should be preferred to all Dillon Street employees, with the result that all Beltway employees would continue to work and the employees to be laid off would all come from the ranks of the former Dillon Street employees. Their position was that a Beltway employee with one month of seniority should be preferred over a Dillon Street employee with 30 years of seniority. They based their position on the technical argument that the Beltway labor agreement could not be amended in any way which would affect their seniority rights even when the Company and the Union were faced with the unprecedented and unanticipated task of merging two plants into one.

At the same time that the Beltway employees were contending that the Dillon Street employees should have been put at the end of the departmental seniority lists (endtailing), the Dillon Street employees were contending that the seniority lists should be combined on the basis of length of service (strict seniority) since most of the Dillon Street employees had greater seniority than most of the Beltway employees. Had this suggestion been adopted, the remaining workforce would have consisted primarily of former Dillon Street employees, and the great bulk of the laid-off employees would have consisted of former Beltway employees. The Dillon Street employees argued for such a result even though approximately 50% of the merged production represented former Beltway

production.

Faced with the extreme positions of the Beltway group and the Dillon Street group, the Company and the Union adopted a middle position which was fair to both groups. Both the District Court and the Court of Appeals below found with no difficulty that under settled legal principles, the Company and the Union had the right to amend the two labor agreements in order to provide for the merger of the two plants. These Courts also found that the Union had fairly represented both groups of employees by agreeing to the dovetailed seniority arrangement.

ARGUMENT

Throughout the course of this litigation, the Petitioners have refused to recognize that the law has been settled by numerous Federal Court

decisions, including decisions of this Court, that a union and an employer do have the right to amend their collective bargaining agreement over the express opposition of employees covered by the agreement, as long as the union is fairly representing all of the employees affected by the amendment.

I. The Agreement Was Properly Amended

It is well-settled law that a collective bargaining representative must be accorded great discretion in negotiating for the employees whom it represents. Ford Motor Company v. Huffman, 345 U.S. 330 (1953). Only where a collective bargaining representative engages in arbitrary, discriminatory or bad-faith conduct with regard to its representation of the employees that it represents will its actions be found to violate its duty of fair representation owed to those

employees. Vaca v. Sipes, 386 U.S. 171 (1966). Similarly, where an employer enters into an agreement with a union which is subsequently attacked by the employees represented by that union, the employer cannot be found liable to the employees by virtue of his having entered into the agreement unless it is first found that the union has violated its duty of fair representation to the employees in concluding the agreement. Vaca v. Sipes, supra.

In the case of Ford Motor Company v. Huffman, 345 U.S. 330 (1953), this Court was confronted with a mid-term contract amendment whereby present and future employees would be granted seniority credit for periods of military service which occurred prior to their employment by the company. This amendment was prejudi-

cial to the employees who had not been in the military service and who suddenly became junior to other employees to whom they had previously been senior. The Court upheld the authority of the union to negotiate such a contract amendment under Sections 7 and 9(a) of the National Labor Relations Act, stating:

> ". . .Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id. at 339.

Other Federal Courts have reaffirmed the authority of unions to

amend the provisions of existing collective bargaining agreements during their term. Carpenter v. Brady, 241 F.Supp. 679 (D. Minn. 1965); Southerlan v. OPEIU, Local 277, 396 F.Supp 1207 (N.D. Tex. 1975); Hayden v. RCA Global Communications, Inc., 443 F.Supp. 396 (N.D. Cal. 1978).

Various commentators and scholars have agreed. Summers, The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation?, 126 U. PENN L. REV. 251, 265, 267 (1977); Rosen, Fair Representation Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Workers in Collective Bargaining, 15 HAST. L. REV. 391, 421-422 (1964); Summers, Individual Rights In Collective Bargaining Agreements and Arbitration, 37 N.Y.U. L. REV. 362, 396-397; Comment, Post-Vaca

Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units, 19 VILL. L. REV. 885, 902-907 (1974); Lehmann, Unions Duty of Fair Representation - Steele and its Successors, 30 FED. B.J. 280, 286 (1971).

Thus it is beyond argument that the Union herein had the authority to amend the Beltway Plant and the Dillon Street Plant agreements in face of the pending merger of operations, even though the Beltway employees opposed such action. The Petitioners confuse decisions holding that arbitrators must apply unamended agreements in accordance with their terms with decisions permitting parties to amend agreements. Thus the Petitioners erroneously cite Humphrey v. Moore, 375 U.S. 335 (1964) and Price v. International Brotherhood of Teamsters, 457 F.2d 605 (3rd Cir. 1972), in a

vain attempt to suggest conflict in an area where the Courts are in complete agreement.

In Humphrey v. Moore, supra, this Court was reviewing a decision by a Joint Conference Committee which dovetailed the seniority lists of two competing automobile transporting companies after a reorganization and transfer of certain territory of one company to the other company. The Joint Conference Committee was comprised of representatives of employers and unions and operated as an arbitration panel under the grievance procedure provided in the contract. The majority opinion of the Court analyzed two issues: (1) whether the Joint Conference Committee in rendering a decision on the grievance of the employees at the absorbing company acted within its authority under the

express provisions of the collective bargaining agreement and (2) whether the local union in declining to support the grievance as it was processed through the grievance procedure and before the arbitration panel violated its duty of fair representation to the grieving employees. The Court found that the grievance procedure in the contract authorized the arbitration panel to render its decision merging the seniority lists of the two employee groups and that the union did not violate its duty of fair representation.

The Court was dealing with the well-settled restriction on arbitrators which prohibits them from deviating from the terms of a labor agreement; it was not concerned with the right of a union and a company to negotiate an amendment to a contract. The latter issue was not before the

Court, as noted in footnote 7 of its opinion. The concurring opinion of Justice Goldberg, however, inappropriately evaluated the conduct of the Joint Conference Committee in terms of negotiations between the parties. The majority correctly rejected this analysis of the case in that the parties did not negotiate an amendment to the contract; rather, the Joint Conference Committee, acting as an arbitration panel, rendered a decision under the grievance procedure of the contract.

The Court held with respect to the union's conduct in taking a position in favor of dovetailing seniority lists:

> ". . .We are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in

> supporting the position of one group of employees against that of another. . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not-so-frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievances processes.
>
> As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination. . .One group or the other was going to suffer. . .By choosing to integrate seniority lists, based upon length of service at either company, the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors." (Emphasis added.) 375 U.S. at 349-50.

In the case of Price v. International Brotherhood of Teamsters, supra, the Third Circuit was called

upon to review a decision by a National Grievance Committee which had dovetailed the seniority list for a closed terminal into that of a new terminal. While upholding this action, the Court refused to follow Justice Goldberg's concurrence in Humphrey v. Moore, on the ground that the action before it for review involved arbitration under a contract rather than amendment of a contract. At 457 F.2d 610, the Court said:

> ". . .absent appropriate amendment of the labor contract there could be no changes in the agreement that would abrogate rights contained in it." (Emphasis added.)

The Court went on to analyze the actions of the arbitration panel in light of the Supreme Court's holding in the Steelworkers Trilogy, which deals with the authority of arbitrators.

That the Court of Appeals in Price recognized the authority of a union to negotiate an "appropriate amendment of the labor contract" during its term is supported by recent scholarly commentary. Professor Clyde M. Summers, author of the lead article cited by the Court of Appeals in Price, in a more recent article analyzes the fair representation duty of a union in its administration of a collective bargaining agreement and clearly differentiates that situation from the authority of a union to amend a contract through negotiations with an employer.[1] While denying the right of a union to ignore or nullify provisions of a collective bargaining agreement granting rights to employees

1 Summers, The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?, 126 U. Penn. L.Rev. 251 (1977).

through the process of administering the contract, Professor Summers clearly acknowledges the authority of a union to change such provisions of the contract by negotiating amendments to the agreement with the employer. Professor Summers in differentiating the two actions by a union states at page 265:

> "There is no practical need for the union's having the power to nullify provisions of the contract by refusing to process grievances. If changed circumstances require changes in the agreement, the union and the employer can, as suggested in Price, negotiate an amendment to the contract." (Emphasis added.)

In summary, all Federal Courts and all commentators agree that a union and an employer have the right to amend their labor agreements under circumstances similar to those in the present case.

II. The Units Were Properly Merged

With respect to the fact that the Union and the Company in the present case merged the two operations into one bargaining unit, they had a clear right to do so. It is hornbook law that the parties to a collective bargaining relationship are free to restructure the bargaining unit as needed:

> ". . .And even when the Board has defined a unit the parties may wish to, and by law are free to, agree on a negotiated unit different from the certified or recognized unit. In advanced forms of collective bargaining, there may be a number of different bargaining units applicable to the employees in one certified unit, or there may be one unit including more than a single certified or recognized unit. In each instance the combination of units must be established by voluntary agreement of the parties.
>
> Because the law encourages voluntary settlement of disputes without government intervention, the Board has

> gone far in accepting as lawful negotiating units established by consensual agreement of the parties. Similarly, the accepted legal theory that there may be several appropriate units applicable to any group of employees means that the parties may agree upon which such unit their contract will cover." The Developing Labor Law, 426-427 (C.J. Morris ed. 1971).

The Federal Courts have expressly recognized the authority of the parties to mutually agree on changes in their bargaining unit, including the combining of separate certified units. Douds v. International Longshoremen's Association, 241 F.2d 278 (2nd Cir. 1957); Beriault v. Local 40, Super Cargoes and Checkers of the International Longshoremen's and Warehousemen's Union, 445 F.Supp. 1287 (D. Ore. 1978). Further, in NLRB v. Wheland Company, 271 F.2d 122 (6th Cir. 1959), a case similar on its facts to the present one, the Sixth

Circuit found that where an employer abolished two separate divisions and consolidated their operations into a new division, a new bargaining unit comprised of all of the employees in the new division was formed.

In the instant case, the Company's decision to merge the production operations effectively created a single merged bargaining unit. There could be no question that the Union represented all of the employees in the merged unit. The parties therefore agreed to negotiate and execute an amended agreement which consolidated the two prior agreements into one just as the two plants' operations would be consolidated into one. Certainly the parties had the right to recognize by contract the reality that there was only one merged unit.

In an attempt to suggest a

conflict between the Circuits where none exists, the Petitioners at pgs. 16-20 of their Petition cite the cases of General Warehousemen and Helpers Local 767 v. Standard Brands, Inc., 579 F.2d 1282 (5th Cir. 1978); Sperry Systems Management Division, Sperry Rand Corporation v. NLRB, 492 F.2d 63 (2nd Cir.), cert. denied 419 U.S. 831 (1974); Local 7-210, Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Union Tank Car Company, 475 F.2d 194 (7th Cir.), cert. denied, 414 U.S. 975 (1973); and Glendale Manufacturing Company v. Local No. 520, International Ladies' Garment Workers Union, AFL-CIO, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961). None of these cases is relevant to the present case since each of them involves a situation where a union was attempting to negotiate the con-

tractual rights of employees whom they did not represent.

In the Standard Brands case, the arbitration award set aside by the Fifth Circuit had imposed wages and benefits from a Teamsters' contract at one of the company's plants on another of the company's plants represented by the Machinists Union. Explaining its refusal to enforce the award, the Fifth Circuit said at 579 F.2d 1295:

> "This is in direct and irreconcilable conflict with the rights of the Denison employees, under NLRA, to be represented by I.A.M. and, through it, to negotiate and contract the wages and working conditions at Denison."

In the Sperry Rand case, a union at one of the company's plants was attempting to have its contract imposed on non-union employees at another of the company's plants. The Second Circuit held that such conduct constituted

an unfair labor practice.

In the Union Tank Car Company case, an arbitrator had ordered the company to apply its agreement at a plant represented by the Oil and Chemical Workers Union to a plant covered by an agreement with the Boilermakers Union. The Court refused to enforce the award on the grounds that applying the Oil and Chemical Workers contract to a plant covered by a Boilermakers Union contract would violate the National Labor Relations Board's certification of the Boilermakers Union as the exclusive bargaining agent at the second plant.

In the Glendale Manufacturing Company case, the arbitration award required the company to bargain with a union which had been decertified by the employees of the company. The Fourth Circuit refused to enforce the

award on the ground that it would be an unfair labor practice for a company to deal with a union which had been voted out by the company's employees.

Thus the cases cited by the Petitioners are completely irrelevant to the present case where the Union represented the employees at both the Dillon Street Plant and the Beltway Plant and therefore had the legal authority under the National Labor Relations Act to negotiate on their behalf. There is no conflict between these decisions and the decision of the Fourth Circuit in the present case since the factual and legal issues were completely different.

CONCLUSION

The holding of the Court of Appeals below that the Union (and therefore the Company) had the right to amend its collective bargaining

agreement under the circumstances of this case is in accordance with well-settled principles of law and is supported by decisions of this Court and of all other Federal Courts which have ruled on the matter. Thus, the Fourth Circuit's decision herein is not in conflict with the decision of another Court of Appeals on the same matter, does not involve an important question of federal law which has not been settled by this Court, and does not decide a federal question in a way in conflict with applicable decisions of this Court. A Writ of Certiorari, therefore, should not be granted under the standards set forth by the Rules of this Court.

Respectfully submitted,

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